STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: SERAFINO TOMASSETTI, Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 and Article 19 of the Labor Law, dated April 19, 2018, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 18-023 RESOLUTION OF DECISION

APPEARANCES

Serafino Tomassetti, Brooklyn, petitioner pro se.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Benjamin T. Garry*, of counsel), for respondent.

WITNESSES

Serafino Tomassetti, for petitioner.

Senior Labor Standards Investigator Joseph Ryan, for respondent.

WHEREAS:

Petitioner Serafino Tomassetti (hereinafter "Tomassetti") filed a petition in this matter on May 18, 2018, pursuant to Labor Law § 101, seeking review of an order issued against him by respondent Commissioner of Labor on April 19, 2018. Respondent filed her answer to the petition on August 17, 2018.

Upon notice to the parties a hearing was held in this matter on January 11, 2019, in New York, New York before Molly Doherty, Chairperson of the Board, and the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues.

The order to comply with Article 6 (hereinafter "unpaid wages order") under review directs compliance with Article 6 and payment to respondent for unpaid wages to two claimants in the

amount of $11,530.00 for the time period from May 30, 2013 to July 21, 2013, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $8,751.42, liquidated damages in the amount of $11,530.00, and assesses a 100% civil penalty in the amount of $11,530.00, for a total amount due of $43,341.42.

The order under Article 19 (hereinafter "penalty order") assesses a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee from on or about May 30, 2013 to July 26, 2013.

Petitioner alleges that the order is invalid and unreasonable because he did not hire claimants, therefore petitioner was not their employer under the Labor Law.

SUMMARY OF EVIDENCE

Wage Claims

On August 6, 2013, Sophia Sands (hereinafter "Sands") filed a claim against petitioner alleging that she was owed a total of $17,470.00 in unpaid wages from May 30, 2013 to July 21, 2013. Sands was a home aide employed by petitioner to care for petitioner's mother and sister. She worked seven days per week, 24 hours per day. The claim form states that the agreed upon hourly wage was $17.50. Sands said in her claim form that she was never paid any wages. Sands' claim form states that "Serafina Tommasetti" was her employer and that "Tommasetti" and Celsa Peyser were the responsible persons. It further states that Celsa Peyser hired Sands and that she requested unpaid wages from "Serafina Tommasetti" on August 6, 2013 but he didn't pay her saying he had no money.

Maria Williams (hereinafter "Williams") also filed a claim against petitioner. She did not date her claim form and instead signed her name where the date was to be written. Her claim form alleges that she was owed a total of $7,140.00 in unpaid wages from July 5, 2013 to July 20, 2013. Williams was a home aide employed by petitioner to care for petitioner's mother and sister. She worked seven days per week, 24 hours per day. The claim form states that the agreed upon hourly wage was $17.50. Williams said in her claim form that she was never paid any wages. Williams's claim form states that "Serafina Tommasetti" was her employer, that Celsa Payser hired her and "Serafina Tommasetti" and Celsa Payser were the responsible persons. It further states that Williams asked "Serafina" for unpaid wages on August 5, 2013 but he didn't pay her saying that he had no money.

Serafino Tomassetti's Testimony

Tomassetti's mother, Maria Tomassetti, became sick and needed some assistance to help her at her home, located in Brooklyn, New York. Tomassetti's sister, Celsa Peyser (hereinafter "Peyser"), hired aides to help their mother. Tomassetti was not involved in hiring the aides but he frequently visited his mother and would see the aides at her house. Tomassetti does not remember Sands or Williams by name. Tomassetti spends every other summer in Italy. He does not recall if he was in Italy during the relevant period in 2013.

Tomassetti does not know if Peyser hired aides for his mother through an agency. He does not know how they were paid other than the few times when his mother asked him to go to the bank to take out cash for her to use to pay the aides. He testified that he only did that a few times and otherwise he doesn't know if they were always paid in cash or sometimes paid by check. Peyser was responsible for everything regarding the claimants but he did not ask her to testify at the hearing because he did not want to "get her into trouble."

During the claim period, Tomassetti lived in a house near his mother's house in Brooklyn and he would sometimes sleep at his mother's home. Peyser lived in Wantagh, New York during the claim period but would come to see their mother on weekends and a few times during the week. She also spent the night at their mother's house sometimes.

Tomassetti has another sister who is disabled and lives with his mother. He testified that the aides did not help his sister.

Senior Labor Standards Investigator Joseph Ryan's testimony

Senior Labor Standards Investigator Joseph Ryan testified that the claimants told him several times that petitioner was their employer. Ryan did not investigate whether Peyser was claimants' employer despite both claimants stating that Peyser hired them and set the final rate of pay on which Ryan based his calculations. Ryan never received any documentation from petitioner. Ryan rescheduled a compliance conference so that petitioner could attend after petitioner informed him that he was not aware of the first compliance conference. Petitioner also did not show up for the second compliance conference. Ryan determined that 100% liquidated damages and 100% civil penalties should be assessed because petitioner did not attend two compliance conferences, did not provide records, did not make payment and did not settle or resolve the matter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of the Board Rules of Procedure and Practice (12 NYCRR) § 65.39.

Petitioner's burden of proof in this matter was to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; Board Rules [12 NYCRR] § 65.30; *Garcia v Heady*, 46 AD3d 1088, 1090 [3d Dept 2007]; *Matter of Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]; *Matter of RAM Hotels, Inc.*, Docket No. PR 08-078 at p. 24 [October 11, 2011]). A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable," and any objections not raised shall be deemed waived (*id.* § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (*id.* § 103 [1]). The hearing before the Board is *de novo* (Board Rules [12 NYCRR] § 66.1 [c]). Petitioner argues that he wasn't the claimants' employer because he did not hire them or know anything about their employment. We find, as discussed below, that petitioner failed to meet his burden to prove that he was not the claimants' employer.

Petitioner Was the Claimants' Employer

We find that Tomassetti is individually liable as an employer under Articles 6 and 19 of the Labor Law. "Employer" as used in Labor Law Article 6 includes "any person . . . employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]; *see also* Labor Law § 641 [6]). "Employed" means "permitted or suffered to work" (Labor Law § 2 [7]). Like the New York Labor Law, the federal Fair Labor Standards Act (FLSA) defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]).

In *Herman v RSR Sec. Servs. Ltd.*, (172 F3d 132, 139 [2d Cir 1999] *citing Carter v Dutchess Comm. College*, 735 F2d 8, 12 [2d Cir 1984] and *Goldberg v Whitaker House Coop.*, 366 US 28, 33 [1961]), the Second Circuit Court of Appeals explained the "economic reality test" used for determining employer status:

> "[T]he overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors include whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (internal quotations and citations omitted).

No one of these factors is dispositive, as the purpose of examining them is to determine the economic reality based on a "totality of circumstances" (*id.*). Respondent determined that petitioner was the claimants' employer based on the claim forms, which named petitioner as a responsible party and indicated that the claimants asked petitioner for their unpaid wages, as well statements that the claimants made to Ryan that petitioner was their employer. Petitioner's burden was to prove at the hearing that he is not, as a matter of economic reality, the claimants' employer (*id.; see also Matter of Jocelyne Wildenstein*, Docket No. PR 15-269 at p. 5 [October 26, 2016]). Petitioner's only evidence to prove he was not the claimants' employer was his own testimony, which was too general, vague, and uncorroborated to evidence that he did not, as a matter of economic reality, have control over the claimants.

Tomassetti testified that his sister, Peyser, made all the decisions regarding the claimants' employment, including the decision to hire the claimants and the decision about their rate of pay. Petitioner's assertion that his sister made all employment decisions regarding the claimants was uncorroborated. Petitioner did not ask Peyser to testify because "[he wasn't] going to accuse [his] sister and get her into trouble." Moreover, petitioner's argument that his sister was an employer under the Labor Law, even if true, is unpersuasive and does not necessarily exculpate Tomassetti from individual liability as a worker can have more than one employer (*Ansoumana v Gristede's Operating Corp.*, 255 F Supp 2d 184, 189 [SDNY 2003]). Tomassetti also generally denied hiring the claimants but testified that he did sometimes pay the claimants with cash that he withdrew from his mother's bank account and testified to frequently visiting his mother and witnessing the aides working at her house. That petitioner did not hire claimants does not mean he was not their employer as that is only one factor in the *Herman* test (*Herman*, 172 F3d at 139). Lastly, Tomassetti testified that he may have been in Italy during the relevant period but that he could not

be sure. We do not credit petitioner's general, conclusory testimony without witnesses or documentary evidence to support it. We find petitioner failed to meet his burden to prove that he was not the claimants' employer as established by the claim forms and the specific information that the claimants gave to Ryan during the investigation. As such, the Board affirms the respondent's finding that petitioner was an employer.

Petitioner's Failure to Maintain Payroll Records

Article 6 of the Labor Law requires that an employer pay wages to its employees (Labor Law § 191). Labor Law § 190 (1) defines "wages" as the "earnings of an employee for labor or services rendered." Articles 6 and 19 of the Labor Law also require employers to maintain, for six years, certain records of the hours their employees worked and the wages they paid them (Labor Law §§ 195 [4] and 661). The records must show for each employee, among other things, the number of hours worked daily and weekly, the amount of gross wages, deductions from gross wages, and allowances, if any (*id.*). Employers must keep such records open for inspection by the Commissioner or a designated representative or face issuance of a penalty (Labor Law §§ 661 and 662 [2]). In the absence of required payroll records, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other evidence, even if results may be merely approximate (*Ramirez v. Commissioner of Labor*, 110 AD3d 901, 901-02 [2d Dept 2013]; *Matter of Mid Hudson Pam Corp.* v. *Hartnett*, 156 AD2d 818, 820-21 [3d Dept 1989]).

Petitioner neglected to offer the legally required records of the days that the claimants worked and the wages paid to them either at the investigative phase of this matter or at the hearing before the Board. As such, the Commissioner's determination that petitioner failed to maintain legally required payroll records was reasonable and valid.

The Wage Orders are Affirmed

Based on the record before us, we find that petitioner did not meet his burden to show that he was not the individually liable as the employer nor did he maintain legally required records of hours worked and wages paid to claimants. Petitioner also did not introduce any evidence challenging the wages in the orders and the issue is thereby waived pursuant to Labor Law § 101 (2). As such, we affirm the wage orders.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment of those wages shall include "interest at the rate of interest then in effect as prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment." Banking Law § 14-a sets the "maximum rate of interest" at "sixteen per centum per annum." Here, respondent correctly determined that claimants were not paid all wages owed and petitioner did not offer any evidence to challenge the imposition of interest. As such, we affirm the interest in the wage orders.

Liquidated Damages

Labor Law § 218 provides that when wages are found to be due, respondent shall assess against the employer the full amount of the underpayment or unpaid wages and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment or nonpayment of wages was in compliance with the law. Here, respondent correctly determined that claimants were not paid all wages and petitioner failed to offer any evidence challenging the imposition of liquidated damages. As such we affirm the liquidated damages in the unpaid wages orders.

The Civil Penalty is Affirmed

The unpaid wages order and the minimum wage order include a 100% civil penalty. Labor Law § 218 (1) provides that when determining an amount of civil penalty to assess against an employer who has violated a provision of Article 6 or 19 of the Labor Law, respondent shall give:

> "due consideration to the size of the employer's business, the good faith basis of the employer to believe that its conduct was in compliance with the law, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with record-keeping or other non-wage requirements."

Petitioner did not introduce any evidence to challenge the civil penalty. As such, we affirm the civil penalty in the wage orders.

The Penalty Order is Affirmed

Labor Law § 218 (1) provides that where a violation is for a reason other than an employer's failure to pay wages, the order shall direct payment to respondent of a civil penalty in an amount not to exceed $1,000.00 for a first violation. In this case, respondent assessed a $1,000.00 penalty against petitioner for failure to keep and/or furnish true and accurate payroll records for each employee from on or about May 30, 2013 through July 26, 2013. Petitioner did not challenge the penalty order. We affirm the penalty order.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The unpaid wages order is affirmed; and

2. The penalty order is affirmed; and

3. The petition for review be, and hereby is, denied.

Molly Doherty, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York, on
March 6, 2019.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The unpaid wages order is affirmed; and

2. The penalty order is affirmed; and

3. The petition for review be, and hereby is, denied.

Molly Doherty, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Gloribelle J. Perez, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Utica, New York, on
March 6, 2019.